TABLE OF CONTENTS OF BRIEF

	Page
Opinions Below	1
Jurisdiction	2
Question Presented for Review	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Argument	2
Relief	3

INDEX TO APPENDICES

A-C	Opinions Below (see page 1)	4-10

IN THE

Supreme Court of the United States

No. .....

JACK ROSE,
Petitioner, Petitioner and Appellant Below

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent, Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States

Petitioner demands that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Sixth Circuit affirming a judgment of the United States Tax Court.

OPINIONS BELOW

The opinions and decisions in the courts below are:

A Opinion of the United States Tax Court filed June 17, 1971, (p. 4).

B Decision of the United State Tax Court entered July 14, 1971, (p. 7).

C Opinion of the United States Court of Appeals for the Sixth Circuit filed May 1, 1972, (p. 8).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit affirming the United States Tax Court's judgment of July 14, 1971, was filed May 1, 1972.

28 U.S.C. Sec. 1254(1) is believed to confer jurisdiction on this Court to review the decision in question by writ of certiorari. The United States Constitution, Amendment V confers a *duty* on this Court to declare the judgment of the Tax Court to be invalid.

QUESTION PRESENTED FOR REVIEW

Does a court afford a litigant due process of law where it denies him an opportunity to be heard?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment V:

> ". . . nor shall [any person] be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Judgment was entered against the petitioner by the United States Tax Court without affording him an opportunity to be heard.

ARGUMENT

A litigant is deprived of his property without due process of law when judgment is entered against him without affording him an opportunity to be heard.

RELIEF

Petitioner demands his constitutional rights.

Jack Rose
23999 West Ten Mile Road
Southfield, Michigan 48075
Tel. 313-352-0952

Dated: July 12, 1972.

APPENDIX A

T. C. Memo. 1971-147

UNITED STATES TAX COURT

JACK ROSE Petitioner *v.*

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 957-70 Filed June 17, 1971

Jack Rose, pro se.

Gary F. Walker, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

STERRETT, *Judge*: Respondent determined a deficiency of $8,367.93 in petitioner's income taxes for 1966. Due to concessions by respondent, the only issue remaining for decision is whether certain attorney fees paid by petitioner on the behalf of his wife constitute alimony or separate maintenance deductible under section 215.[1]

FINDINGS OF FACT

Jack Rose (hereinafter referred to as petitioner) resided in Southfield, Michigan, at the time of filing his petition herein. Petitioner filed his indivdual 1966 Federal income tax return with the internal revenue service center, Cincinnati, Ohio.

Prior to 1966, petitioner's wife, Doris Wertheimer Rose (hereinafter referred to as Doris), sued him for divorce in the Circuit Court for the County of Oakland in Pontiac, Michigan. Doris was represented by an attorney. On February 7, 1966, the Circuit Court entered an order directing petitioner to pay $3,000 to Doris' attorney as interim counsel fees. The ordered payment was made by petitioner from a fund previously deposited with the Circuit Court.

Petitioner resisted his wife's suit for divorce. On April

[1] All statutory references are to the Internal Revenue Code of 1954 unless otherwise indicated.

20, 1966, the Circuit Court found in favor of petitioner, and dismissed Doris' action with prejudice.

On his 1966 Federal income tax return, petitioner claimed a deduction for alimony in the amount of $6,750, of which $3,000 represented the attorney fee of Doris paid under the Circuit Court order. Respondent, in a statutory notice dated November 25, 1969, said:

> Attorney fees totaling $3,000.00, paid on behalf of your wife, Doris Rose, do not qualify as deductions of alimony under Section 215 of the Internal Revenue Code.

OPINION

Petitioner paid his wife's attorney fees in a contested divorce action. The question before us is whether petitioner can deduct these fees as alimony or separate maintenance. Section 215 permits a husband to deduct alimony or separate maintenance payments to his wife provided those payments are includable in the wife's income under section 71. Under section 71(a) such payments are includable in the wife's income only if they are "periodic payments" which the husband is obliged to make pursuant to a decree of divorce or separate maintenance, a written separation agreeement, or a decree for support. Under section 71(c)(1) periodic payments specifically do not include "installment payments discharging a part of an obligation the principal sum of which is, * * * specified in the decree."

Respondent contends that the attorney fees in question do not qualify as periodic payments under section 71. Petitioner asserts that the issue of whether the payments are periodic has not been raised before and that the burden of proof is on the respondent. Petitioner's contention is misplaced. It is perfectly acceptable for respondent in the statutory notice to state the reasons for his determination

in broad language and then, upon submitting the matter to the Court, narrow the grounds for his determination to a specific theory consistent with and inherent in the original determination. *Arthur Sorin*, 29 T.C. 959, 969 (1958). Clearly, such is the case here, because as noted above, payments are not deductible under section 215 unless they are includable in the wife's income under section 71. Consequently, the burden of proof does not shift to respondent, and his determination remains presumptively correct.

The evidence does not reveal the existence of a decree or agreement requiring petitioner to pay his wife alimony or separate maintenance. Assuming that such a decree or agreement exists and that the terms of the Circuit Court's February 7, 1966 order requiring petitioner to pay his wife's alimony fees were made part of such decree or agreement, those fees are nonetheless not deductible as alimony or separate maintenance. This Court has consistently held that the payment of a wife's attorney fees under the circumstances here present does not constitute a periodic payment, and consequently is not deductible by the husband, and we so hold in this case. *F. Ewing Glasgow*, 21 T.C. 211, 218 (1953); *Arthur B. Baer*, 16 T.C. 1418, 1422 (1951) affirmed on this point 196 F. 2d 646 (C.A. 8, 1952).

Petitioner in his brief requests an additional hearing in which to offer evidence on the question of whether the attorney fees here constituted a periodic payment. It is quite clear that anything the petitioner could advance in such a hearing would not change the result of this case. Accordingly a new hearing is not warranted, and is denied. *Selwyn Operating Corporation*, 11 B.T.A. 593, 594 (1928).

Because of consessions by respondent and in accordance with the foregoing;

Decision will be enter under Rule 50.

APPENDIX B

UNITED STATES TAX COURT

JACK ROSE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 957-70

DECISION

Pursuant to the opinion of the Court filed June 17, 1971, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1966 in the amount of $1,645.89.

(Signed) SAMUEL B. STERRETT,
Judge.

Entered: July 14, 1971.

APPENDIX C

No. 71-1944

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK ROSE,
Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

APPEAL from the Decision of the United States Tax Court.

Decided and Filed May 1, 1972.

Before: PHILLIPS, Chief Judge, KENT, Circuit Judge, and FEIKENS*, District Judge.

PER CURIAM. This is an appeal from a decision of the United States Tax Court which found deficiencies in income tax due from the taxpayer for the taxable year 1966. (P-H Memo T.C., par. 71.147 (1971)).

The facts are relatively simple. Prior to 1966 the taxpayer's wife instituted an action for divorce in the Circuit Court, Oakland County, Michigan. The Circuit Court entered an order directing taxpayer to pay a $3,000 counsel fee to the wife's attorney. The taxpayer paid the fee and took a deduction on his 1966 Federal Income Tax Return

* Honorable John Feikens, United States District Court for the Eastern District of Michigan, sitting by designation.

on the ground that the counsel fee was alimony. The Commissioner disallowed the counsel fee as being an inappropriate deduction under the provisions of Section 215 of the Internal Revenue Code of 1954, 26 U.S.C. § 215. The taxpayer appealed to the Tax Court which sustained the Commissioner's disallowance of this deduction.

The taxpayer here complains that he was not given an adequate hearing before the Tax Court, and that the denial of an opportunity to explain to the United States Tax Court why he was entitled to the tax deduction claimed constituted a denial of due process. The record shows that the taxpayer was given a hearing before the Tax Court and afforded an opportunity to file a reply brief to the Commissioner's brief. The taxpayer now complains that he was not properly advised by the Commissioner or by the Tax Court of the issues of fact upon which the Commissioner would rely and was not informed of the cases which would be cited by the Tax Court in its opinion.

The taxpayer misunderstands his obligations under the Internal Revenue Code. Under the Code the burden of establishing the right to a deduction is on the taxpayer. As stated in *United States* v. *Olympic Radio and Television*, 349 U.S. 232, 235 (1955):

> "We deal here with a deduction which one obtains not as of right, but as of grace. *Deputy* v. *du Pont*, 308 U.S. 488, 493. The taxpayer has the burden to show that it is within the provision allowing the deduction."

and more generally the same rule is reflected in *Norton* v. *Commissioner of Internal Revenue*, 192 F.2d 960, 961, 962 (8th Cir. 1951), and see also *Service Life Insurance Company* v. *United States*, 293 F.2d 72, 77 (8th Cir. 1961);

Renstrom v. *United States,* 220 F.Supp. 688, 691 (D.C. Neb. 1963).

For the reasons herein stated and for the reasons stated in the opinion of the Tax Court the judgment of the Tax Court is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-161

JACK ROSE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claimed an income tax deduction for 1966 in the amount of $3,000, representing attorney's fees paid by petitioner to counsel for his wife in a divorce action. Pursuant to court order, the payment was made from a fund which petitioner had deposited with the court. (Pet. App. 4-5.) Respondent disallowed the claimed deduction on the ground that the payment did not qualify as alimony or separate maintenance taxable to the wife under Section 71(a) of the Internal Revenue Code, which relates only to "periodic payments"; under Section 215 of the Code, the payment would be deductible by petitioner only if includible in his wife's income. The Tax Court upheld respondent's determination and the court of appeals affirmed. (Pet. App. 6, 10.)

Contrary to petitioner's sole contention (Pet. 2), he was afforded a full opportunity to be heard in the Tax Court. He presented evidence at the trial and argued his position in a brief. In fact, the Tax Court granted an exception to its rules and permitted petitioner to file his brief after that of respondent in order that he might rebut respondent's arguments.[1]

The Tax Court, in its discretion, properly overruled the request made in petitioner's brief for an additional hearing, since petitioner gave no indication of what new evidence he would produce. In support of its position that the payment in controversy was not alimony, respondent relied on the fact that the payment did not meet the express requirement of Section 71(a) that alimony or separate maintenance must be paid periodically. Since the payment was made as a lump sum from a fund deposited with the court, petitioner obviously could have produced nothing at an additional hearing which would qualify the payment as periodic. Accordingly, the Tax Court correctly concluded that anything petitioner could advance at the additional hearing would not change the result in this case. (Pet. 6.)

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

---

[1] See Commissioner's brief in the Court of Appeals, Appendix B. The Tax Court's Rule 35(b) requires the taxpayer and the government to file their briefs simultaneously unless the court orders otherwise.

U.S. GOVERNMENT PRINTING OFFICE : 1972